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Supreme Court of the United States

October Term, 1948.

No. 487

DOUGLAS CHANDLER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

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Supreme Court of the United States

October Term, 1948.

No. .....

DOUGLAS CHANDLER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Douglas Chandler respectfully shows as follows:

Summary Statement of the Matters Involved.

The petitioner, hereinafter called the defendant, was convicted of treason against the United States upon an indictment returned into the District Court of the United States for the District of Massachusetts on December 30, 1946 (R. 1-9). Judgment that he should be imprisoned for life and be sentenced to pay a fine of Ten Thousand Dollars ($10,000) was entered on July 30, 1947, after trial by jury (R. 32-34). The judgment was affirmed by the United States Court of Appeals for the First Circuit on December 3, 1948.

The opinion of the Court of Appeals summarizes the indictment as follows:

The indictment charged that the defendant, in various places within the German Reich, and at all times beginning on December 11, 1941, and continuing thereafter up to and including May 8, 1945, he then and there being a native-born citizen of the United States, and a person owing allegiance to the United States, in violation of said duty of allegiance, did knowingly, intentionally, and traitorously adhere to the enemies of the United States, and more particularly, to wit, the Government of the German Reich, and the German Radio Broadcasting Company and the officials and employees thereof, giving to the said enemies of the United States aid and comfort within the United States and elsewhere; that the aforesaid adherence of the defendant, and the giving of aid and comfort by him to the aforesaid enemies of the United States "consisted of working as a radio speaker and commentator in the U. S. zone of the Short Wave Station of the German Radio Broadcasting Company, a company controlled by the German Government, which work included the preparation and composition of commentaries, speeches, talks and announcements, and the recording thereof for subsequent broadcast by radio from Germany to the United States"; that these activities of the defendant "were intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of said war, and to weaken and destroy confidence in the administration of the Government of the United States." Paragraph 4 of the indictment enumerates 23 overt acts alleged to have given aid and comfort to the said enemies and which were knowingly and traitorously committed by the defendant with treasonable intent to adhere to and give aid and comfort to said enemies. Thirteen of these overt acts were withdrawn from consideration, some by the United States and others by the district judge, so that ten were sub-

mitted to the jury as possible acts of treason. Generally described, one of these overt acts was arranging for the making of a recording, two were speaking into a microphone in the actual recording of talks for broadcast, one was participation in a conference for improvement in the operation of the Short Wave Station, two were attendance and participation in conferences of radio commentators at which directives were received from higher authority relative to the content of broadcasts, four were participation in conferences aimed at securing the resumption or continuance of defendant's broadcasting activities.

The indictment concluded:

> "That the District of Massachusetts was the Federal Judicial District into which the defendant was first brought, shortly prior to the date of the return of this indictment."

There was some evidence in support of all the allegations of the indictment, except, as we believe, the averments as to venue.

There was, however, no allegation, and no direct proof by two witnesses, of anything said by the defendant in any of his talks recorded for broadcast, hereinafter for convenience sometimes called broadcasts. Twelve recordings, made at various dates in 1942, and identified by witnesses as reproducing the defendant's voice, were introduced in evidence and played to the jury, but solely upon the issue of his intent to betray. Other evidence as to the content of defendant's broadcasts described it only in vague and general terms.

None of the recordings introduced in evidence was specifically related to any of the overt acts set out in the indictment. Two of the overt acts, numbered 17 and 18 in the indictment, consisted of speaking into a microphone, but

there was no allegation nor requisite proof of what was then said. The jury were, however, permitted to infer from the existence of a treasonable intent manifested by the recordings made in 1942 that what was said in 1944 was propaganda. See the charge (R. 1833):

> "If you find beyond a reasonable doubt that Chandler voluntarily caused broadcast recordings to be made as charged in overt acts 17 and 18 and they contained propaganda that assisted Germany in its psychological warfare against the United States, and you also find beyond a reasonable doubt that these recordings actually assisted Germany in its war effort against the United States, you must find the defendant gave Germany actual aid and comfort in the conduct of its war against the United States by means of these recordings."

All of the other overt acts submitted to the jury were acts merely preparatory to broadcasts. Whether they directly resulted in any was not alleged nor shown by proof.

There was no evidence that broadcasts of the defendant's talks were heard in the United States except by employees of the Federal Communications Commission, nor that, if heard, they actually had the effect intended.

The evidence was overwhelmingly to the effect that the defendant sincerely believed his broadcasts to be in the best interests of the United States and that he made them from patriotic motives. His attitude toward his conduct was thoroughly studied by psychiatrists employed both by the government and by defense counsel, who testified with respect to it on the issue of insanity. They differed only as to whether the defendant was a true paranoiac or merely a fanatic. All agreed that he was utterly sincere and patriotic (R. 1493, 1543, 1574, 1623, 1646, 1648, 1666, 1339, 1387, 1423). Moreover, the case was submitted to the jury with

instructions that if the defendant's words were intended for use as "propaganda", the fact "that his motive was not to aid the enemy but was a desire to save the United States and the world from a Jewish or Bolshevist menace, or to obey a call, or to change the personnel of our government" was immaterial (R. 1823). "Propaganda" was defined as "the dissemination of ideas for the purpose of influencing people and it may be true or false" (R. 1830). The jury were permitted to find the defendant guilty although what he said was true and motivated by a desire to save the United States from perils in the existence of which he sincerely believed.

Certain questions in the case arise out of the manner of the defendant's removal from Germany to the United States. Briefly summarized, the facts were as follows:

An earlier treason indictment was returned against the defendant on July 20, 1943, in the United States District Court for the District of Columbia, although that Court then had no jurisdiction of the defendant's person nor of the subject matter. In May, 1945, the defendant was taken into custody by the United States Army in Germany, but released on October 23, 1945. He was re-arrested by the Army on March 12, 1946, at the request of the Department of Justice, and held abroad until December 10, 1946, when he was removed under armed guard by plane to the United States, stopping en route at Paris, the Azores, and Newfoundland. The intended destination was Washington, D. C. The plane came into the United States in the State of Maine. As a result of mechanical trouble, an unscheduled landing was made at Westover Field, Massachusetts, early in the morning of December 14, 1946. The defendant was taken from the plane and remained at the field for about three hours, and was then placed on another plane and brought to Washington, D. C. He was there arrested by a

United States Deputy Marshal and arraigned on the earlier indictment. On December 30, 1946, the indictment on which he was tried was returned and on the following day he was arrested on a capias issuing out of the District Court for the District of Massachusetts and removed to that district.

The defendant filed a motion to dismiss the indictment, a motion for discharge from custody in the nature of a plea to the jurisdiction of his person, a motion challenging the venue, a motion for acquittal, and a motion in arrest of judgment. The questions of law upon which the appeal is based arose upon the denial of these motions, upon certain portions of the charge, upon refusals to give instructions requested, and upon rulings on the admission of evidence.

Reasons Relied on for the Allowance of the Writ.

Your petitioner is advised and alleges that the decision of the Circuit Court of Appeals was erroneous and should be reviewed by this Court, in that—

1. The decision is that treason against the United States is committed by a citizen of the United States residing in territory of their enemies, who adheres to such enemies, giving them aid and comfort.

2. The decision is that treason is committed under such circumstances although the only acts of aid and comfort are the preparation for publication of talks intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of a war and to destroy confidence in the administration of the government of the United States; that is, that the expression of ideas and opinions in such a case may be a treasonable act.

3. The decision is that there may be a conviction for treason under such circumstances without allegation or proof by two witnesses of what was said in such talks.

4. The decision is that there may be a conviction without any evidence that such talks actually had or would naturally have the effect intended.

5. The decision is that a course of conduct over a period of more than three years may be charged as a single treasonable enterprise but that direct proof by two witnesses, of a few fragmentary and relatively insignificant elements of that course of conduct will warrant a conviction.

6. The decision is that the publication of words intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of a war and to destroy confidence in the administration of the government of the United States is evidence of a treasonable intent.

7. The decision is that such words are evidence of a treasonable intent though spoken from patriotic motives upon a sincere conviction that their publication is for the best interests of the United States.

8. The decision is that an intent to give aid and comfort is equivalent to an intent to betray.

9. The decision is that a District Court of the United States may lawfully exercise jurisdiction over the person of a defendant brought within the Court's jurisdiction in violation of the laws of the United States.

10. The decision is that a citizen of the United States charged with treason might during the occupation of Germany by the United States Army be lawfully brought to the United States, in violation of the right of asylum granted by

treaty and international law, by the use of the Army in violation of statute, 10 U. S. C. #15.

11. The decision is that Congress has by law directed the place of trial of treason committed within the territorial jurisdiction of a foreign government.

12. The decision is that a defendant brought into the United States by the Army in a plane which traverses the District of Maine bound for the District of Columbia, and transferred to another plane in the District of Massachusetts to complete the transit after a brief pause because of mechanical trouble, is first brought into the District of Massachusetts within the meaning of Judicial Code, Section 41.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the First Circuit, commanding that Court to certify and send to this Court on a certain day to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled in its docket, No. 4296, *Douglas Chandler, Defendant, Appellant, v. United States of America, Appellee*, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

DOUGLAS CHANDLER,
By his Attorney,
EDWARD C. PARK.

SUPREME COURT OF THE UNITED STATES

October Term, 1948.

No. .....

DOUGLAS CHANDLER,
Petitioner,
vs.
UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinions in the United States District Court for the District of Massachusetts upon a motion to dismiss the indictment and upon an inquiry into the defendant's sanity are reported in *United States v. Chandler*, 72 F. Supp. 230, and in the record (R. 41, 52). The opinion of the United States Court of Appeals for the First Circuit is not yet reported but appears in the record (R. 1908—1946).

Jurisdiction.

The judgment of the United States Court of Appeals was entered on December 3, 1948. Jurisdiction of this Court to issue the writ applied for is invoked under Title 28, United States Code, Section 1254 (1).

Statement of the Case and Specification of Errors.

The summary statement of the matters involved in the case given in the petition contains in brief form all that is

material to the consideration of the questions presented. The statement of reasons relied on for the allowance of the writ shows the errors intended to be urged. In the interest of brevity, they are not reiterated at this point.

Argument.

The writ prayed for should issue:

I. THE QUESTIONS DECIDED BY THE COURT OF APPEALS ARE IMPORTANT AND HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

We know of no prior conviction for foreign treason, that is, where the overt acts were committed beyond the territorial jurisdiction of the United States. If the statute extends to foreign treasons, particularly by a citizen domiciled in enemy territory and, therefore, subject to a local allegiance to the sovereign of that territory, what trafficking with the enemy in such a case constitutes a criminal adherence and giving of aid and comfort should be defined.

We know of no prior conviction for treason based on "the dissemination of ideas for the purpose of influencing people, and it may be true or false" (R. 1830). If such a conviction may be sustained, this Court should determine whether it is enough to show that the defendant had a general purpose to persuade citizens and residents of the United States to decline to support the United States in the conduct of a war or to destroy confidence in the administration of the government, and to establish by two-witness proof certain preparatory acts without such proof of what was said or the effect of what was said.

May a course of conduct extending over a period of years be charged in a single count as a single treasonable enter-

prise and established by two-witness proof of isolated acts which are but minute fragments of the whole? No prior decision has so held.

Is treasonable intent necessarily to be inferred from an expression of ideas and opinions which may give the enemy aid and comfort? The District Court so instructed the jury, in substance. Or may a jury infer treasonable intent from any words in opposition to a war? Perhaps, this is what the Court of Appeals purported to decide. Or is the rule simply this, that a citizen, residing in enemy territory, may not publish his views about the war if he does so for the enemy? Is it immaterial and not to be taken into consideration by the jury that the views expressed were entertained sincerely and were in fact voiced from patriotic motives? Is the question whether the defendant "had the heart of a patriot" to be answered only by God, and not to be submitted to a jury, as the Court of Appeals suggests? If these questions are answered as they were by the District Court and the Court of Appeals, the crime of treason may be committed without a guilty mind. This Court should examine those questions.

We think it is clear that the defendant was entitled to asylum in Germany for political offenses against the United States under general principles of international law and under the terms of a treaty between the two nations. The questions, whether the military occupation of Germany by the United States terminated that right of asylum, and, if not, whether a United States Court should exercise jurisdiction of one unlawfully deprived of it, have never been decided by this Court and should be.

Finally, the jurisdiction of the subject matter should be examined. If Congress has made foreign treason a crime, has it appointed a place for trial as required by the Constitution? And if Section 41 of the Judicial Code with re-

spect to "Offenses on the high seas" is applicable, do the words "first brought" have one meaning when a person charged with crime is brought in by air and another when brought by sea? If, as the Court of Appeals remarks, the objection to the venue is upon a "highly technical ground", it is, nevertheless, one involving constitutional rights of which the defendant should not be deprived merely because it seems to the Court "unfortunate".

We are informed that all of the questions herein involved were also raised in the trial of Robert H. Best in the same District Court, from whose conviction an appeal is now pending though not yet submitted. We have read in the newspapers that the Department of Justice is prosecuting other so-called "radio traitors" in other districts, in which we presume like issues will be presented. It is in the interest of all concerned that the principles applicable should be considered and promulgated by this Court.

II. The decision below is in conflict with principles laid down in decisions of this Court.

We suppose that we should not try, within the limits of a brief in support of a petition for certiorari, to argue fully as many questions as this case presents, or to furnish more than an abridgment of the reasons why we believe the decision of those questions by the Court below to have been erroneous. What follows is not, therefore, all that may be said for the defendant.

(a) Treason against the United States is not committed by a citizen residing in territory of their enemies, who adheres to such enemies, giving them aid and comfort.

We do not believe, as did the Court of Appeals, that it is clear that under the constitutional definition of treason

Congress has power to punish a citizen residing in enemy territory for treason, at least if what is charged as treason consists merely of adhering to the enemies of the United States, giving them aid and comfort.

It has always been recognized that, by reason of the obligation of local allegiance to the country of residence, there might be in such a case some adherence which was not criminal.

The Venus, 8 Cranch 253.
McConnell v. Hector, 3 Bos. 6 Puller's Reports, 113, 114.
Hale: *Pleas of the Crown*, pp. 164-165.

Indeed, prisoners of war may volunteer for work "for a variety of purposes designed directly to aid the captor in the prosecution of the war, enabling it to release potential fighters from non-military tasks of which the proper performance might be, nevertheless, a military necessity".

3 Hyde: *International Law*, p. 1851.
War Department: *Rules of Land Warfare*, Sections 100-104.
Geneva Convention of 1929, Art. 27.

It must be clear that citizens of the United States residing in an enemy state are not guilty of treason by reason of some acts of trafficking with the enemy which, in the case of other citizens, might warrant a conviction.

Accordingly, the omission of express words of territorial limitation from the constitutional definition, may have been wholly in the interest of simplification on the theory that the principle of construction against extraterritorial effect would govern.

In any event the Act of Congress, 18 U. S. C. #1, should not be given extraterritorial effect. To provide the same

test of treason in the case of citizens residing in enemy territory as in the case of those residing in the United States would be unreasonable. If Congress had intended to punish foreign treasons, it would have legislated specifically against them. In view of all the doubts, including those as to the constitutional power, the statute should not be construed as including adherence in enemy territory to the enemies of the United States.

(b) Treason is not committed by the expression of ideas and opinions.

> "That mere words that are expressions of opinion, printed or written, will not constitute acts of treason"

was conceded by the District Court in its opinion on the motion to dismiss (R. 47). The proposition seems to be fully supported by the authorities.

Frohwerk v. United States, 249 U. S. 204, 208.
United States v. Werner, 247 F. 708, 710.
Wimmer v. United States, 264 F. 11.
Equi v. United States, 261 F. 53.
United States v. Herberger, 272 F. 278.
Chafee: *Free Speech in the United States*, pp. 259-260.
Hurst: *Treason in the United States*, 58 H. L. R. 430.

And if expressions of opinion will not constitute treason, acts preparatory to their publication, such as conferring with others, can hardly be charged as overt acts.

The Court of Appeals said of the "statements to be found in the books to the effect that mere words cannot amount to an overt act of treason":

"That is true in the sense that the mere utterance of disloyal sentiments is not treason; aid and comfort must be given to the enemy. But the communication of an idea, whether by speech or writing, is as much an act as is throwing a brick, though different muscles are used to achieve different effects. * * * The significant thing is not so much the character of the act which in fact gives aid and comfort to the enemy, but whether the act is done with intent to betray" (R. 1932-33).

There is, of course, logic in what the Court of Appeals says. There are, however, cases in which, as Mr. Justice Holmes once observed, "a page of history is worth a volume of logic". *New York Trust Co. v. Eisner*, 256 U. S. 345, 349. We think this such a case. See

Hurst: *Treason in the United States*, 58 H. L. R. 430:

"In the great English treatises from which American lawyers took their knowledge and ideas of the English law, the outstanding note of political liberalism in the discussion of treason was the detailed condemnation of the doctrine that 'mere' spoken or written expression of ideas, not amounting to a direct persuasion or consulting to kill the king, could constitute the crime * * *.

"* * * Plainly Article III, Section 3, was viewed as completely barring prosecutions of such conduct as 'treason', and such has been the opinion of the courts."

Logically, if words in opposition to a war may be overt acts of treason, and if a jury may infer a treasonable intent from the fact that such words will naturally give aid and comfort to the enemy, without regard to the patriotic motives prompting their utterance, proof of publication should be enough to support a conviction. The Court, however, suggests that the Constitution grants a special immunity for the expression of opinions to citizens, "whatever the speaker's purpose", "in the normal processes of domestic political opposition", but that such immunity

would not extend to the defendant, since "he trafficked with the enemy and as their paid agent collaborated in the execution of a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully" (R. 1934-35).

The theory of the Court appears to be that words which it is known will give the enemy aid and comfort are treason, but that such treason is privileged if "in the course of the normal activities of political opposition". But a speech in the United States in the course of such normal activities would naturally be far more dangerous to the United States than the same speech cast upon the air by an enemy agent in Germany to an audience limited to those owning short wave radio equipment and by the vicissitudes of radio transmission. The Court of Appeals suggests that the immunity is afforded:

> "in order that, in the course of normal activities of political opposition, the expression of honest criticism and sincere conviction as to what is best for the country may not be fettered by fear of a jury's finding of traitorous purpose in the passion and tumult of a subsequent prosecution for treason" (R. 1934).

This means, as we understand it, that the question whether the words were an "expression of honest criticism and sincere conviction" should not be left to the jury. If it were, the supposed immunity might be lost "in the passion and tumult of a subsequent prosecution". But is it for the jury to decide whether the words were spoken "in the course of normal activities of political opposition"? And if they were not, is it material that they were expressions of honest opinion and sincere conviction? The Court of Appeals thought not, at least, in this case:

> "Whether Chandler was 'sincere' in what he did, whether he had the heart of a patriot, is a matter that

may be sifted out at the Last Great Judgment Seat; but the law of treason is concerned with matters more immediate" (R. 1943).

We submit that the theory that expressions of opinion may be treasonable, whether or not sincere and proceeding from the heart of a patriot, and are immune or privileged only if "in the course of normal activities of political opposition", is unsound. Historically, "mere words", meaning thereby "the dissemination of ideas for the purpose of influencing people", have been held not treasonable because not overt acts. The distinction drawn has been between mere talk about what to do, and doing. We submit that that distinction is still valid, and that "mere words", even if they are revolutionary words, cannot make overt acts of treason.

(c) If treason may be committed by "mere words", it is not enough to allege and prove by the direct testimony of two witnesses that the defendant spoke or prepared to speak.

If the expression of ideas and opinions constitutes treason, it is the gravamen of the offense, not merely its setting. It is the words spoken, and not acts like telephoning for an appointment to speak them or presenting oneself at a microphone so that the words may be recorded or using the muscles required for speech, which give aid and comfort to the enemy. The treasonable character of the dissemination of ideas must depend primarily upon the words used. If what is said is lawful, the act of preparing to say it cannot be regarded either as a crime in and of itself or as a step in the performance of a crime.

The words are the essential facts constituting the offense and should have been set forth in the indictment. Rule 7 (c) of the Federal Rules of Criminal Procedure.

The words are the overt acts and should have been specially laid as such in the indictment.

> *United States v. Gooding*, 12 Wheat, 460, 475.
> *United States v. Haupt*, 136 F. 2nd 661, 665.

They should have been established by the testimony of two witnesses.

> *Cramer v. United States*, 325 U. S. 1, 34:
> "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."

We find, however, in this case no allegation of what the defendant said at any time; no proof thereof by the testimony of two witnesses. The only specific evidence of what the defendant said at any time was the recordings made in 1942 and identified by witnesses as of his voice. From that evidence, admitted solely on the issue of the defendant's intent to betray, the jury was permitted to infer that when the defendant spoke into a microphone in 1944 his words were not only intended to, but did, give aid and comfort to the enemy.

The Court of Appeals upholds the conviction not because the overt acts alleged and proved "viewed in rigid isolation and apart from their setting * * * afforded aid and comfort to the enemy", but because in the light of all the evidence they "appear as typical routine activities of Chandler in the fulfillment of his continuous employment as radio commentator for the German Propaganda Ministry over a period of three years" (R. 1934).

Surely, treason is not committed by a citizen of the United States domiciled in enemy territory merely because he acts as a radio commentator. This conviction rests upon the nature of what was said. We submit that what was

said should have been set forth in the indictment and should have been shown by the testimony of two witnesses, not left to inference from other evidence.

(d) If treason may be committed by "mere words", it should be made to appear that the words actually gave aid and comfort to the enemy.

An attempt to commit treason is not within the constitutional definition. Nor will the intent dispense with proof of an act of actual aid and comfort.

Cramer v. United States, 325 U. S. 1, 25, 34.
Ex parte Bollman, 4 Cranch 75.

There was in this case no proof whatsoever that German propaganda was effective, and particularly none that the defendant's broadcasts had the effect for which they were intended. There was not even evidence that they were heard in the United States except by certain employees of the Federal Communications Commission. Any aid and comfort which the defendant's activities gave the enemy were, we believe, wholly illusory.

The Court of Appeals says:

> "It is immaterial that the enemy mission as a whole, which defendant assisted, did not achieve its purpose" (R. 1939).

Of course, we do not contend that, to make treason, an act must accomplish the purpose for which it was designed. On the other hand, mere purpose is not enough; the design must be one which may accomplish that purpose. We suppose that, even if words may be treason, mere mumbo-jumbo uttered with disloyal intent would not be. History does not show that German propaganda had any dangerous effect upon the prosecution of the war by the United States. There is room for belief that the defendant's talks of the

character shown by the recordings, if heard in the United States, would have had an effect quite contrary to that intended.

We submit that neither the Court of Appeals nor the jury were entitled to conclude upon the evidence at the trial that what the defendant said would naturally have persuaded citizens to decline to support the United States in the conduct of the war or have weakened confidence in the administration.

(e) If the indictment was not duplicitous in charging twenty-three overt acts in one count, and is to be construed as charging a single treasonable enterprise, direct proof by two witnesses of more than a few routine and insignificant overt acts was required.

We thought the indictment duplicitous, and the defect not purely technical because it might lead the jury to convict upon proof of a mere state of mind. We believe that in fact the jury did convict upon that basis. It seems to us also that the Court of Appeals has affirmed as if the existence of a course of conduct established by any evidence would warrant conviction by proof of any unimportant fragment thereof by two witnesses.

Certainly the indictment might have laid the overt acts in separate counts, and acquittal on one count would not bar conviction on another. Here there was not as in *Haupt v. United States*, 330 U. S. 631, any close relation in time between the overt acts alleged. In this case the overt acts charged extended over a period of three years and occurred in various places in Germany and Austria. If the treason consisted not of those acts but of a single enterprise, they were but infinitesimal and trivial parts of it. If not all the details in that enterprise need have been proved by two witnesses, certainly far more such proof was re-

quired. At least, its shape and broad measurements should have been so established. Clearly, even that cannot be said to have been done, since there was no such evidence of what the defendant said.

(f) Words in opposition to a war are not evidence of treasonable intent.

A citizen may in time of war attempt to persuade others not to prosecute it and may criticize the administration without being guilty of treason. This the Court of Appeals concedes, citing:

Frohwerk v. United States, 249 U. S. 204, 208.

If words may be spoken innocently, no inference of guilt should be drawn from their utterance. When any fact will support two inferences, one of innocence and the other of guilt, it does not prove guilt.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339.
Manley v. Georgia, 279 U. S. 1, 7.
The Bothnea, 2 Wheat. 169, 177.

In this case, the recordings of what the defendant said in 1942 were admitted solely as evidence of his intent to betray the United States, and the jury were allowed to infer from their contents an intent to betray that persisted from 1942 to 1944. What was reproduced in the court room from the recordings was undoubtedly repugnant to the jury. Yet the words might lawfully have been uttered by a citizen in the United States.

Hartzell v. United States, 322 U. S. 680, 689.

To permit an intent to betray to be inferred from speeches in opposition to a war and to convict for some later trivial act preparatory to a new speech is to enlarge

the crime of treason far beyond historical conceptions, and to make any opposition to a war some evidence of treasonable intent.

(g) Patriotic motives are inconsistent with an intent to betray and if found to exist negative such an intent.

The evidence was overwhelmingly to the effect that the defendant's activities were motivated by a desire to save his country from perils to which he believed it exposed. The District Court, in charging the jury, assumed that it might find the defendant's motives for his conduct patriotic, but instructed that that fact was immaterial.

The Court of Appeals was of the opinion that an inquiry into the defendant's sincerity and patriotism was too "subtle" a task to be imposed upon a jury (R. 1943).

But such an inquiry was not beyond the capacity of the nine psychiatrists who testified, some for the defendant and others for the government. All of them agreed that the defendant was sincere and had acted from patriotic motives. Each of them testified that he was able to form such an opinion, and that he was experienced in the detection of sham beliefs and their differentiation from ideas and opinions sincerely held. Such an inquiry by the psychiatrists was, of course, essential to their general inquiry into the defendant's mental health. We see no reason why, if the jury were to make a finding with respect to the defendant's sanity, an inquiry into an essential subordinate fact should prove too subtle.

What the Court of Appeals, however, has actually decided is that treason is to be judged objectively, by the standards of the reasonable man, without inquiry whether the defendant had the heart of a patriot, and that so judged.

> "He is guilty of treason, whatever his motive." (R. 1944).

We think this inconsistent with prior decisions of this Court.

Cramer v. United States, 325 U. S. 1, 31.
Haupt v. United States, 330 U. S. 631, 635.
Knauer v. United States, 328 U. S. 654.
Keegan v. United States, 325 U. S. 478, 494.
See also *United States v. Werner*, 247 F. 708, 710.

Moreover, the Court of Appeals in affirming the conviction has approved the District Court's instructions to the jury that the defendant's motives were wholly immaterial, although as said in *Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks*, 281 U. S. 548, 559:

> "Motive is a persuasive interpreter of equivocal conduct, * * *."

(h) An intent to do acts which give aid and comfort to the enemy is not equivalent to an intent to betray.

The foregoing quotes a request for instructions, numbered 83 (R. 1884), specifically denied by the District Court (R. 1852-55, 1694). See also his charge (R. 1822-3).

We submit that the request should have been given.

Cramer v. United States, 325 U. S. 1, 31.
Haupt v. United States, 330 U. S. 631, 635.

(i) The District Court ought not to have exercised jurisdiction over the person of the defendant if brought within the jurisdiction in violation of the laws of the United States.

We think this proposition fully supported by the following authorities which the Court of Appeals does not discuss.

Cook v. United States, 288 U. S. 102, 121.
Ford v. United States, 273 U. S. 593.

United States v. Schonweiler, 19 F. 2nd 387.
United States v. Ferris, 19 F. 2nd 925.

The cases which the Court does mention seem to us clearly distinguishable.

It is to be noted that the District Court's jurisdiction depended upon the fact that the defendant was "first brought" into that district by the Army, as we believe, in violation of law. The fact that his subsequent removal from the District of Columbia to the District of Massachusetts may have been by due process is not, therefore, in our view material. The question is whether the District Court in Massachusetts acquired jurisdiction over the person of the defendant if brought into the district in violation of a law of the United States.

(j) The removal of the defendant from Germany by the United States Army was in violation of the laws of the United States.

International law grants to political offenders against one government a right of asylum in the territories of another.

Ex parte Kentucky v. Dennison, 24 How. 66.
United States v. Rauscher, 119 U. S. 407.
Hyde: *International Law,* p. 1019.

This principle has been embodied in our extradition treaties, among them that with Germany. 47 U. S. Stat. Part 2, p. 1862.

Neither the war nor the subsequent military occupation abrogated the treaty of extradition with Germany.

Clark v. Attorney General, 331 U. S. 503.
Neely v. Henkel, 180 U. S. 109, 120.
The Axis in Defeat, State Dept. Pub. No. 2423, p. 72.

Both international law and treaty may create private rights. Since asylum is granted primarily for the benefits of the individuals involved, the right of asylum is a private right to be enforced by the Courts.

United States v. Rauscher, 119 U. S. 407.

It seems clear that the defendant could not have been extradited or brought here by any process of law. The Attorney General had no authority to cause him to be removed except by proceedings authorized by law.

Valentine v. United States, 299 U. S. 3, 9.

Moreover, the employment of the Army was in direct violation of statute, 10 U. S. C., Section 15. The principle that the Army shall not be used to execute civil process existed before that statute was enacted and stems from the Petition of Right in 1688.

Ex parte Merryman, Taney: Circuit Court Decisions, Campbell, p. 246.

(k) Congress has not by law directed the place of trial of treason committed within the territorial jurisdiction of a foreign government.

Art. III, Section 2, Paragraph 3, of the Constitution, provides:

> "The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed in any State, the trial shall be at such Place or Places as the Congress may by law have directed."

The only provision of law referred to by the Government as directing the place of trial of treason committed in Germany is Section 41 of the Judicial Code, which provides

> "*Offenses on the High Seas.* The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought."

Language substantially identical with that of Section 41 was held "to apply only to offenses committed on the high seas, or in any river, haven, basin, or bay."

Ex parte Bollman, 4 Cranch 75, 136.

It was held not to apply to crimes committed in the Indian Country, and, therefore, that no place for trial of crimes in such territory had been directed.

United States v. Alberty, 24 Fed. Cas. No. 14426.
United States v. Starr, 27 Fed. Cas. No. 16379.
United States v. Ivy, 26 Fed. Cas. No. 15451.
United States v. Ta-wan-ga-ca, 28 Fed. Cas. No. 16435.

See also:

United States v. Chapman, 14 F. 2nd 312, 313.
1 Op. Atty. General, 57.
19 Op. Atty. General, 66, 67.

Moreover, Congress has repeatedly given legislative approval to a construction of Section 41 as not applicable to offenses on land by specific direction for the places of trial of many crimes, other than treason, committed on land beyond the territories of the United States. See 18 U. S. C., Sections 499, 500, 338b, 494; 48 U. S. C., Section 1417; 22 U. S. C., Sections 1203, 142; 28 U. S. C., Section 50; 16 U. S. C., Section 27.

The dictum in *United States v. Bowman*, 260 U. S. 94, to the contrary, was made in a case in which no question of

venue was raised below and no appearance nor argument made for the defendant in this Court.

(1) The defendant was not "first brought" into the District of Massachusetts.

The defendant was brought into the United States by plane which crossed the boundary in the air over the State of Maine bound for the District of Columbia, but landed in Massachusetts, because of mechanical trouble, where the defendant was transferred into another plane and brought to Washington.

The jurisdiction of the District Court was based upon the allegation that the defendant was "first brought" into the District of Massachusetts within the meaning of Section 41 of the Judicial Code.

"Brought", counsel below agreed, means "brought in custody".

Kerr v. Shine, 136 F. 61.

"Brought", we submit, means "brought with intent to leave" and not "brought in the mere course of transit".

Taylor v. United States, 207 U. S. 120, 124.

That construction has been given the words "first brought" when a defendant was brought into the country by sea. The fact that the ship on which the defendant was brought anchored first in one district, or that the defendant was transferred from one vessel to another in that district, was held not to prevent the district for which the defendant was destined and to which he was brought from being regarded as that into which he was "first brought".

United States v. Arwo, 19 Wall. 486.
Pedersen v. United States, 271 F. 187.
United States v. Baker, 5 Blatch. 6.

We see no reason for distinguishing between a ship traveling the sea and one traveling the air. If there is merely a temporary pause at a port in one district for transfer to another plane as an incident of a continuous voyage to another district, the prisoner has not been "brought" to the first district.

If, however, there is such a distinction between the two means of transportation that a prisoner traveling in a plane is brought into any district which he enters, we assert that the appellant was first brought into the District of Maine. "First brought" must refer either to the point of entrance or to the point of ultimate disembarkation. No sound reason can be urged why Congress should select as the place of trial of persons brought into the United States *in custody* an intermediate point of transfer selected solely for the purpose of facilitating the voyage.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the First Circuit and finally reverse it.

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